(33)

No. 94-896-CSX
Status: GRANTED

Title: BMW of North America, Inc., Petitioner
v.
Ira Gore, Jr.

Docketed:
November 17, 1994

Court: Supreme Court of Alabama

Counsel for petitioner: Frey,Andrew L.

Counsel for respondent: Haley,John W., Bolt II,Andrew W., Gottesman,Michael H.

Op. releasted 102993 withdrawn, den rehs & substituted the op.

Entry	Date	Note	Proceedings and Orders
1	Nov 17 1994	G	Petition for writ of certiorari filed.
4	Dec 21 1994		Brief of respondent Ira Gore in opposition filed.
2	Dec 28 1994		DISTRIBUTED. January 13, 1995 (Page 3)
3	Dec 28 1994	X	Reply brief of petitioner filed.
6	Jan 17 1995		REDISTRIBUTED. January 20, 1995 (Page 17)
7	Jan 23 1995		Petition GRANTED.
			**********
9	Feb 22 1995		Order extending time to file brief of petitioner on the merits until March 23, 1995.
27	Mar 22 1995		Brief amicus curiae of TIG Insurance Company filed.
10	Mar 23 1995		Joint appendix filed.
11	Mar 23 1995		Brief of petitioner BMW of North America, Inc. filed.
12	Mar 23 1995		Brief amici curiae of New England Council, et al. filed.
13	Mar 23 1995		Brief amici curiae of Product Liability Advisory Council, Inc., et al. filed.
14	Mar 23 1995		Brief amicus curiae of Owens-Illinois, Inc. filed.
15	Mar 23 1995		Brief amici curiae of Richard L. Blatt, et al. filed.
16	Mar 23 1995		Brief amici curiae of American Council of Life Insurance, et al. filed.
17	Mar 23 1995		Brief amicus curiae of National Association of Manufacturers filed.
18	Mar 23 1995		Brief amici curiae of Washington Legal Foundation, et al. filed.
19	Mar 23 1995		Brief amicus curiae of Business Council of Alabama filed.
20	Mar 23 1995		Brief amicus curiae of Owens-Corning Fiberglass Corporation filed.
21	Mar 23 1995		Brief amici curiae of American Tort Reform Association, et al. filed.
22	Mar 23 1995		Brief amicus curiae of Center for Claims Resolution filed.
23	Mar 23 1995		Brief amici curiae of Farmers Insurance Exchange, et al. filed.
24	Mar 23 1995		Brief amici curiae of Life Insurance Company of Georgia, et al. filed.
25	Mar 23 1995		Brief amici curiae of CBS, Inc., et al. filed.
26	Mar 23 1995		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
28	Mar 23 1995		Brief amici curiae of American Automobile Manufacturers Association, et al. filed.
29	Mar 23 1995		Brief amicus curiae of Pharmaceutical Research and

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Entry	Date	Note	Proceedings and Orders
			Manufacturers of America filed.
30	Apr 7 1995		LODGING consisting of ten copies of an affidavit submitted by counsel for amicus Richard Blatt.
32	Apr 17 1995		Order extending time to file brief of respondent on the merits until May 30, 1995.
33	May 26 1995		Brief amicus curiae of Trial Lawyers For Public Justice filed.
42	May 26 1995		Brief amicus curiae of National Assn.of Securities and Commercial Law Attorneys filed.
36	May 30 1995		Brief of respondent Ira Gore filed.
39	May 30 1995		Brief amicus curiae of Association of Trial Lawyers of America filed.
37	May 31 1995		Brief amici curiae of Legal Historians James D.A. Boyle, et al. filed.
38	May 31 1995		Brief amicus curiae of Alabama Trial Lawyers Association filed.
43	May 31 1995		Brief amici curiae of Law and Economics Scholars Kenneth G. Dau-Schmidt, et al. filed.
40	Jun 20 1995	G	Application (A94-974) to extend the time to file a reply brief from July 3, 1995 to July 17, 1995 by petitioner BMW of North America, Inc., submitted to Justice Kennedy.
41	Jun 20 1995		Application (A94-974) granted by Justice Kennedy extending the time to file until July 17, 1995.
44	Jul 17 1995		Reply brief of petitioner BMW of North America, Inc. filed.
45	Aug 1 1995		SET FOR ARGUMENT WEDNESDAY, OCTOBER 11, 1995.(1ST CASE).
47	Aug 4 1995		CIRCULATED.
46	Aug 7 1995		Record filed.
		*	Partial record proceedings Supreme Court of Alabama (BOX).
48	Sep 19 1995		LODGING consisting of one copy of transcript of oral argument before the Alabama Supreme Court submitted by counsel for the petitioner.
49	Oct 11 1995		ARGUED.
50	Oct 12 1995	P	Motion of petitioner for leave to file a supplemental brief after argument filed.
51	Oct 18 1995	P	Motion of respondent for leave to file a supplemental brief after argument filed.

Court, U.S.

(1)

No. 94-896 NOV 17 1994

In the Supreme Court of the United States

OCTOBER TERM, 1994

BMW OF NORTH AMERICA, INC.,
PETITIONER

v.

IRA GORE, JR., RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court, having found that the jury's $4,000,000 punitive damages verdict unconstitutionally punished petitioner for hundreds of transactions that occurred entirely outside of Alabama, was obligated to provide a meaningful remedy for that constitutional violation.

2. Whether the $2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.

RULE 29.1 STATEMENT

Petitioner BMW of North America, Inc. is a wholly-owned indirect subsidiary of Bayerische Motoren Werke, A.G., a German corporation. All of BMW of North America, Inc.'s subsidiaries are wholly-owned.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

BMW OF NORTH AMERICA, INC.,
PETITIONER

v.

IRA GORE, JR., RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

Petitioner BMW of North America, Inc. (BMW) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-26a) is not yet reported. The order of the Circuit Court of Jefferson County denying petitioner's post-trial motions (App., *infra*, 27a-30a) is unreported.

JURISDICTION

The Alabama Supreme Court issued an opinion in this case on October 29, 1993. Timely applications for rehearing were submitted by both parties on November 12, 1993 and November 19, 1993. On August 19, 1994, the Alabama Supreme Court withdrew its opinion dated October 29, 1993, denied the applications for rehearing, and issued a substituted opinion. The certificate of judgment of affirmance (App., *infra*, 31a-32a) was issued on September 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

In their journey from the assembly line to the dealer's showroom, automobiles occasionally experience minor damage requiring repair or refinishing. The question then naturally arises whether, or in what circumstances, the fact of repair or refinishing should be disclosed. A growing number of states have undertaken to answer this question by statute or regulation. At present, the vast majority of states to legislate on the subject require disclosure only of repairs or refinishing costing more than 3% (or some higher percentage) of the manufacturers suggested retail price ("MSRP"). See note 12, *infra*. Thus, for instance, the Alabama statute (which was enacted after the events in this case) provides that the failure of a manufacturer or distributor to give notice of repairs costing less than the greater of $500 or 3% of MSRP is not a deceptive trade practice and "shall not constitute a material misrepresentation or omission of fact." Ala. Code § 8-19-5(22)(c).

At the time relevant to this case, BMW had a disclosure threshold that was functionally identical to the one subsequently enacted by the Alabama Legislature. Pursuant to that threshold, it did not disclose that it had performed $601 worth of refinishing on the $40,000 BMW 535i ultimately purchased by Dr. Ira Gore.

Dr. Gore drove his 535i for nine months without noticing anything unusual about his automobile's surface. When he learned that the car had been refinished, however, Dr. Gore immediately sued for fraudulent suppression of material facts and received a jury verdict of $4,000 in compensatory damages and $4 million in punitive damages. The jury arrived at the $4 million penalty by multiplying the supposed diminution in the value of Dr. Gore's car ($4,000) by the total number of cars BMW had refinished and sold throughout the United States over a ten-year period (approximately 1,000). App., *infra*, 16a; R. 585-586, 812-813.[1]

The Alabama Supreme Court acknowledged that the jury had unconstitutionally punished BMW for hundreds of transactions that occurred entirely outside of Alabama — and, indeed, that may have been entirely lawful where they occurred. Instead of fashioning a remedy that redressed this constitutional violation, however, the court merely cut the punitive damages in half under its usual test for determining whether a punitive verdict is excessive. The $2 million punishment left standing by the Alabama Supreme Court remains a staggering 500 times Dr. Gore's compensatory damages. BMW seeks review of the Alabama Supreme Court's decision, which constitutes a blatant violation of its rights under the Due Process Clause.

1. *The BMW Quality Control Process.* Bayerische Motoren Werke, A.G. (BMW AG) manufactures automobiles

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[1] The designation "R. __" refers to the Reporter's Transcript of the trial below.

in Germany. R. 471. BMW purchases newly manufactured vehicles from BMW AG, imports them into the United States, and prepares those cars for distribution and sale throughout the United States. R. 471, 530-531, 538-539.

Occasionally the finish of a vehicle suffers damage between the time the vehicle rolls off the assembly line in Germany and the time it arrives in the United States. The damage could be dents or scratches that occur during the trans-Atlantic voyage (R. 473, 476, 480-481), or it could be blemishes caused by environmental conditions, such as acid rain (R. 478-481).

When newly manufactured automobiles arrive in the United States, their first stop is one of BMW's vehicle preparation centers (VPCs). The VPCs are staffed by technicians (who have been trained to factory standards) and are stocked with the same equipment found in BMW AG's factories in Germany. R. 482, 483, 699-700, 735-737, 784. At the VPCs, the vehicles are prepared for delivery to dealers and inspected for transportation damage as well as any imperfections that may have been missed by BMW AG. R. 472-474, 476, 530-531, 538-539, 646, 650-651.

If a vehicle has been damaged or is otherwise flawed, it is returned to factory quality at the VPC (or, in some instances not pertinent here, at the facility of an independent contractor under the supervision of BMW employees). R. 474, 477, 479, 529-530, 651, 653, 677, 743-744. Refinishing takes place in a specially designed paint booth, in which the paint is applied and baked until hard. R. 652-653. The paint booth provides constant air filtration to minimize the presence of dust in the painting area. R. 652, 732-734, 742, 756. The booth also contains controls for regulation of heat and humidity levels. R. 675-676, 734.

The refinishing process involves numerous steps and quality-maximizing safeguards, including a sophisticated sanding process to remove imperfections in the paint's surface

without damaging the protective undercoatings that had been applied at the factory, a multi-step cleaning process to ensure a smooth finish, and the application of paint to the affected surfaces. R. 652-653, 719-726, 739-742. BMW does not merely repaint the spots that had sustained damage; instead, it repaints the entirety of any panel that has some damage or noticeable imperfection. R. 676-677, 762-763. After the paint has dried, the refinished vehicle is inspected to ensure proper gloss and texture and the absence of imperfections. R. 656-657. The refinishing process is essentially identical to that used by BMW AG in Germany when it detects an imperfection in a car's finish as it comes off the assembly line. R. 552, 651, 661, 680-681, 734, 735-737, 744, 760.

2. *BMW's Disclosure Policy.* During the period relevant to this case, BMW had a formal policy relating to vehicles that required refinishing or repairs upon arrival in the United States. If the cost of the repairs exceeded 3% of MSRP, the vehicle would be placed into company service and driven for up to six months or ten thousand miles. R. 508-510, 532. BMW then would sell it to a dealer at auction as a used vehicle, with whatever disclosures were required by applicable law. R. 532-533, 986.

If the cost of VPC repairs performed on a vehicle did not exceed 3% of the vehicle's MSRP, however, BMW considered the car to be new and sold it to a dealer without disclosure of the repairs. R. 502-503.[2] The policy was adopted in 1983 to satisfy the strictest of the various state statutes then in effect governing disclosure of repairs

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[2] Nonetheless, BMW kept track of such repairs and disclosed the exact type of repairs performed upon a particular vehicle if requested to do so by either a dealer or a customer. R. 306-307, 498, 501, 502, 535.

performed by the manufacturer or distributor prior to sale to a dealer. R. 970-971, 980.[3]

3. *The Events Leading Up To This Case.* In January 1990, Ira Gore, a medical doctor specializing in oncology, purchased a 1990 BMW 535i from German Auto in Birmingham, Alabama, for $40,750.88. App., *infra*, 3a. Dr. Gore drove his car for approximately nine months before taking it to Slick Finish, an independent automobile detailing shop. *Ibid.* He was not dissatisfied with the car's overall appearance; nor had he noticed any problems with, or flaws in, the car's paint. *Ibid.* He simply wanted to make the car look snazzier than it normally would appear. *Ibid.* The proprietor of the detailing shop, Leonard Slick, informed Dr. Gore that his car had been repainted. *Ibid.*

It turned out that the automobile purchased by Dr. Gore had sustained superficial paint damage (presumed by the parties to be the result of acid rain) and that the horizontal surfaces had been refinished at the VPC in Brunswick, Georgia. App., *infra*, 3a; R. 526, 554. In keeping with its nationwide policy, BMW had not disclosed the repairs to German Auto because the cost of those repairs — $601 —

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[3] At the time it adopted the policy (and subsequently), BMW was confronted with a patchwork of state disclosure requirements. Some states required disclosure of repairs exceeding 3% of MSRP and others required disclosure of repairs only if they exceeded 6% of MSRP. Among these, some states required disclosure by dealers and others required disclosure by manufacturers. Many of the statutes permitted the entity with the disclosure obligation to exclude from the calculation the cost of glass, tires, bumpers, and welded parts. R. 970. To simplify matters, BMW adopted the 3% threshold without exception for any kind of parts — *i.e.*, the strictest statutory requirement then in existence — as its nationwide policy. R. 980.

was substantially less than 3% of the MSRP for the vehicle. App., *infra*, 3a.

4. *Proceedings Below.* Dr. Gore never contacted BMW to complain about the refinishing or to ask for any kind of recompense. R. 357, 375-376. Instead, he simply filed suit in Alabama state court. The complaint alleged that BMW's failure to disclose to Dr. Gore that it had performed some refinishing on his vehicle prior to selling it to German Auto constituted fraud, suppression, and breach of contract.

At trial, it was undisputed that the only flaw in the refinishing of Dr. Gore's car was a three or four-inch tape line on the rear fender that the technicians inadvertently had failed to remove. R. 657. There was no evidence that the paint had faded, chipped, or bubbled or that it was likely to do so in the future. The colors of the refinished surfaces matched the colors of the rest of the car. There was no unusual film build-up and the gloss was exactly what would be expected of a vehicle that had come straight off the assembly line. R. 786-790. In short, with the exception of the tape line, which could have been buffed out without damage to the car (R. 657-659, 745-746), Dr. Gore's vehicle was indistinguishable from one that had not undergone refinishing. Although these facts raised serious doubt about the materiality of the non-disclosure, the case was submitted to the jury on the strength of the uncorroborated testimony of the former owner of German Auto that even perfectly refinished vehicles suffer a 10% diminution in value (R. 279-280, 336-337).

During his closing statement, Dr. Gore's counsel requested compensatory damages of $4,000 — representing 10% of the approximately $40,000 purchase price of Dr. Gore's car — and punitive damages of $4 million. The closing statement made clear that the latter figure represented a penalty of $4,000 per car for each of the approximately 1,000 cars that BMW had refinished at a cost of over $300

and sold anywhere in the United States over a ten-year period (R. 812-813):[4]

> They've taken advantage of nine hundred other people on those cars that were worth more — the damage was more than three hundred dollars. If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it.
>
> * * * * *
>
> I urge each and every one of you and hope that each and every one of you has the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it.

The jury did precisely what Dr. Gore's counsel requested, awarding Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages. BMW then filed a combined motion for judgment notwithstanding the verdict, new trial, and remittitur. The trial court denied the motion in all respects. App., *infra*, 27a-30a.

The Alabama Supreme Court affirmed the judgment against BMW, conditioned upon a remittitur of the punitive damages to $2 million. The court acknowledged the soundness of the contention that the verdict violated BMW's due process rights and impinged upon the sovereignty of other

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[4] The $300 threshold was an arbitrary cut-off selected by Dr. Gore's counsel. See R. 585-586. For the sake of simplicity, we will hereinafter use "the number of refinished vehicles" as a short hand for "the number of vehicles refinished at a cost of over $300."

states by punishing BMW for sales that took place entirely outside of Alabama and that were not even shown to be illegal where they occurred. App., *infra*, 16a-17a. Having said that, however, the court did not grant a new trial. Nor did the court apply the jury's $4,000 per car penalty to the number of cars for which the jury lawfully could punish, which would have resulted in a punitive award of no more than $56,000.[5] Instead, the court merely articulated its usual *Green Oil* standards for determining whether a punitive award is excessive,[6] and arbitrarily cut the punitive damages in half. App., *infra*, 9a-10a, 21a.

The Alabama Supreme Court gave no weight to Alabama's recently enacted legislation expressly providing that the non-disclosure of repairs costing less than 3% of MSRP is *not* an unfair trade practice and does *not* constitute "a material misrepresentation or omission of fact." See Ala. Code § 8-19-5(22). The court concluded that the statute was irrelevant because "[t]he public policy of Alabama expressed in the statute had not been enacted at the time BMW NA adopted its policy of nondisclosure." App., *infra*, 7a. The court also found it irrelevant that less than two months before the trial in this case another jury in the same county heard essentially the same evidence relating to BMW's policy, yet found BMW not liable for *any* punitive damages. *Id.* at 13a-15a.

Justice Houston filed a special concurrence. App., *infra*, 22a-26a. He lamented the fact that cases like this one have

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[5] The record reflects that, at most, 14 refinished vehicles — *i.e.*, 1.4% of the cars for which BMW was punished by the jury — were sold in Alabama. App., *infra*, 17a, 23a; R. 972.

[6] See *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223-224 (Ala. 1989).

caused "so many" observers to regard Alabama's punitive damages regime as a "lottery" (*id.* at 26a), and put special emphasis on the disparity in the results of the two nearly identical cases against BMW (*id.* at 25a):

> The *Yates* case and this case are almost identical. The same excellent lawyers represented Yates that represent Gore; the same excellent lawyers represented BMW NA in both cases. Excellent trial judges, in the same judicial circuit, conducted as nearly perfect trials as can be conducted. Each plaintiff was a member of a respected profession; each was a physician. BMW NA was the defendant in each case. How does Gore get $2,000,000 in punitive damages and Yates get nothing in punitive damages? Different juries.
>
> Perhaps Gore, Yates, BMW NA, the citizens of Alabama, and even this Justice will think something is not right — that, to paraphrase a Ray Stevens' song of several years ago, Gore got the gold mine and Yates got something else.

BMW filed an application for rehearing asserting, *inter alia*, that, having concluded that the jury had unconstitutionally punished BMW for transactions occurring entirely outside of Alabama, the court was required either to grant a new trial or to reduce the punitive damages to no more than $56,000 — the $4,000 per car penalty multiplied by the number of Alabama cars. Nine months later, the Alabama Supreme Court issued a substituted opinion and denied rehearing without addressing BMW's arguments.

REASONS FOR GRANTING THE PETITION

It should go without saying that courts have a constitutional obligation not just to identify constitutional violations but also to remedy them. The Alabama Supreme Court utterly failed to satisfy that obligation in this case. Its

unexplained decision to cut the punitive damages in half is entirely unresponsive to the constitutional error that infected the jury's verdict. Summary reversal is warranted to correct the Alabama Supreme Court's dereliction of its duty to provide a meaningful remedy for the unconstitutional punishment.

Putting aside the problem of extraterritorial punishment, the $2 million penalty imposed by the Alabama Supreme Court is, by every objective benchmark, so excessive as to violate the Due Process Clause. Because many of the indicia of excessiveness in this case recur in punitive damages litigation, the case offers an appropriate opportunity for the Court to take up the unfinished business of shaping "the character of the standard that will identify unconstitutionally excessive awards" (*Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994)). That the Alabama Supreme Court could have approved a $2 million punitive judgment in the circumstances of this case strongly suggests that, in the words of the concurrence, "something is not right" (App., *infra*, 25a) and that the lower courts are sorely in need of further guidance from this Court.

I. THE ALABAMA SUPREME COURT ABDICATED ITS RESPONSIBILITY TO PROVIDE A REMEDY FOR THE CONSTITUTIONAL VIOLATION

There can be no question that the jury in this case sought to punish BMW under Alabama law for conduct that took place entirely outside of Alabama and that had no effects within Alabama. As the Alabama Supreme Court found, "the jury's punitive damages award is based upon a multiplication of $4,000 (the diminution in value of the Gore vehicle) times 1,000 (approximately the number of refinished vehicles sold in the United States)" and hence "was based in large part on conduct that happened in other jurisdictions." App., *infra*, 16a.

Nor can there be any question that this sort of extraterritorial punishment violates the Constitution. This Court repeatedly has made clear that it violates due process for a state to apply its law to activities that have no relation to that state. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-823 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-311 (1981) (plurality opinion); *id.* at 327 (Stevens, J., concurring); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-410 (1930). The Court also has held in a variety of contexts that the Commerce Clause and the constitutionally based principle that the states are co-equal sovereigns bar states from regulating conduct occurring outside their boundaries. See, *e.g.*, *Healy* v. *Beer Institute*, 491 U.S. 324, 336-337 (1989); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion); *Bigelow* v. *Virginia*, 421 U.S. 809, 822-824 (1975); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881).[7]

The prohibition against extraterritorial regulation applies with added force when, as here, a state is seeking to punish the defendant for hundreds of transactions that were statutorily authorized in the states in which they took place.[8]

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[7] Although these cases involved the extraterritorial effects of legislation, it is settled that "regulation can be as effectively exerted through an award of damages as through [enforcement of a statute or regulation]." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). See also, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992). This is especially true with respect to punitive damages, which are specifically designed to alter the behavior of the defendant and others similarly situated.

[8] BMW adduced uncontroverted evidence that 60% of the 1,000 sales for which it was punished took place in states that had, by statute or regulation, adopted a disclosure threshold

(continued...)

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort * * *." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Yet that is precisely what the jury did in this case.

The Alabama Supreme Court acknowledged that it was unconstitutional for the jury to "use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award." App., *infra*, 16a (emphasis in original). The court nonetheless proceeded to resolve the case as if no violation had occurred. The court did not even consider what an appropriate remedy would be for a constitutional violation of the sort it had found. Instead, it started with the jury's tainted $4 million award, reviewed that award *for excessiveness* under its standard *Green Oil* factors, and then held that "a constitutionally reasonable punitive damages award in this case is $2 million." *Id.* at 21a.[9] This violated BMW's constitutional rights every bit as much as the jury's original act of extraterritorial regulation.

This Court repeatedly has held that it is not sufficient for state courts merely to recognize the violation of a

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[8] (...continued)
that was equal to or higher than BMW's 3% threshold. App., *infra*, 17a; R. 972. Virtually all of the remaining sales took place in states that had not adopted any disclosure threshold but had never held non-disclosure in circumstances like these to be fraudulent or in any way improper.

[9] Indeed, the finding of unconstitutionality was made *as part of* the *Green Oil* analysis, rather than as a necessary threshold determination. Having started with the wrong question, it was inevitable that the court would arrive at the wrong solution.

constitutional right; they must also provide a remedy that adequately redresses the violation. Thus, in its most recent exposition on the subject, the Court held that, if a state collects under duress a tax that discriminates against interstate commerce, state courts may not simply declare the tax unconstitutional and enjoin its future collection: the Due Process Clause mandates that the state provide backward-looking relief that fully removes the discriminatory effects of the unconstitutional tax. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). See also, *e.g.*, *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment").[10]

The Alabama Supreme Court had two options for redressing the constitutional violation in this case. Most obviously, it could have granted a new trial on punitive damages. Alternatively, it could have applied the jury's

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[10] The Court also has held that state courts cannot limit the relief for a regulatory taking to an injunction. A fully adequate remedy requires payment for the lost use of the property during the time the regulation was in effect. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987). And, of course, the Court repeatedly has emphasized the lower courts' obligation to provide an adequate remedy for violations of the Equal Protection Clause. See, *e.g.*, *Swann* v. *Board of Educ.*, 402 U.S. 1, 16 (1971) ("[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution"); *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971) ("[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation").

$4,000 per car formula to Dr. Gore's vehicle alone or, at most, to the 14 Alabama transactions, which would have resulted in a remittitur to either $4,000 or $56,000. Either remedy would have ensured that BMW was not punished unconstitutionally for conduct occurring entirely outside of Alabama. By contrast, in conducting its standard excessiveness inquiry and then merely cutting the punitive damages in half, the Alabama Supreme Court did nothing to remedy the jury's unconstitutional conduct. Indeed, by using the tainted $4 million figure as its starting point, the Alabama Supreme Court *perpetuated* the jury's constitutional violation.[11]

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[11] Certainly, Justice Houston understood that to be the case. He forthrightly acknowledged that the $2 million punishment in this case is based on "the totality of [BMW's] pattern and practice" — *i.e.*, "evidence that BMW NA sold 983 vehicles in this way." App., *infra*, 24a. Because he understood the $2 million penalty to be for the entirety of BMW's conduct, he expressed the belief that "to allow any additional punitive damages award against BMW NA in regard to the sale of any of the 983 vehicles may violate numerous constitutional rights." *Ibid.*

Even if, contrary to Justice Houston's understanding, the $2 million exaction is only for Alabama-related conduct, it would simply reflect the Alabama Supreme Court's perception of the *maximum* permissible punishment for such conduct. See, *e.g.*, *Big B, Inc.* v. *Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993) ("[i]n remitting a punitive damages award, we must remit only that amount in excess of the maximum amount that a properly functioning jury could have awarded"). But there is no basis for supposing that a jury untainted by unconstitutional motives would have imposed the maximum permissible punishment. To the contrary, *this* jury

(continued...)

If Dr. Gore had appealed to the jury's anti-German bias in seeking a large punitive exaction, there can be no question that the Alabama Supreme Court could not remedy that constitutional violation merely by cutting the jury's tainted penalty in half (or by making any other reduction for that matter). Halving the punitive verdict is no more acceptable when the constitutional violation involves an effort to punish extraterritorially. In either situation, the "remedy" simply bears no relation to the wrong.

The Alabama Supreme Court completely disregarded its constitutional obligation to provide BMW with a meaningful remedy for the deprivation of its constitutional rights. This Court accordingly should grant the petition and summarily reverse the judgment below with instructions to afford a remedy that redresses the constitutional violation.

II. THE $2 MILLION PUNITIVE EXACTION IS GROSSLY EXCESSIVE AND THEREFORE VIOLATES THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE

This case would be worthy of the Court's review even if the Alabama Supreme Court's dereliction of its duty to remedy the constitutional violation were somehow excusable. Assuming for present purposes that the $2 million penalty approved by the court below truly does represent punishment

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[11] (...continued)
indicated an unambiguous intention to punish BMW at a rate of $4,000 for each sale as to which it was entitled to exact punishment. There is thus no reason to conclude other than that it would have imposed punitive damages of $56,000 for the 14 Alabama sales in evidence. In view of the utter improbability that any jury would have imposed the maximum permissible punishment, a remittitur to that amount is a patently inadequate remedy for the constitutional violation in this case.

simply for BMW's Alabama-related conduct, that massive penalty for minimally culpable conduct — nondisclosure of refinishing performed so expertly that it is undetectable to the untrained eye — raises the important and recurring question as to when a punitive exaction violates substantive due process.

This Court has recently expressed its concern that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," particularly in cases involving big businesses "without strong local presences." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2340-2341 (1994). Although procedural safeguards can reduce the risk of arbitrariness, in some cases a guarantee of fair procedures simply is not enough. Accordingly, this Court has recognized that the Due Process Clause "imposes a *substantive* limit on the size of punitive damage awards." *Id.* at 2335 (emphasis added). A plurality of the Court has indicated that punishments that are "grossly excessive" breach that limit and that this "grossly excessive" standard incorporates "a general concern of reasonableness." *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (internal quotation marks and brackets omitted). Beyond that, however, the Court has not had an opportunity to elucidate "the character of the standard that will identify unconstitutionally excessive awards." *Oberg*, 114 S. Ct. at 2335.

The instant case presents the Court with an opportunity to provide meaningful guidance in this area. The case involves several objective indicia of unreasonableness that recur with some frequency in punitive damages litigation. It therefore is a highly appropriate vehicle for developing the "character" of the reasonableness standard.

A. Several Objective Factors Demonstrate The Unreasonableness Of The $2 Million Exaction In This Case.

1. The nature of the misconduct

As both the plurality (113 S. Ct. at 2722) and Justice Kennedy (*id.* at 2726) recognized in *TXO*, the nature of the defendant's misconduct is an extremely significant consideration in any analysis of the reasonableness of a punitive award. Here, several objective factors that recur in punitive damages cases indicate that the $2 million penalty bears no reasonable relationship to the nature of the alleged misconduct.

First, as the Alabama Supreme Court recognized, BMW's 3% threshold is consistent with industry practice. App., *infra*, 11a, 17a. Although adherence to industry custom is not a complete defense to liability in a negligence action (see, *e.g.*, *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932)), it constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one in the amount of $2 million. See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 40-41 (1982) ("[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm"); *Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Maxey* v. *Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc) (finding a $10 million punitive award excessive and remanding for further consideration in light of fact that defendant's design comported with designs of all

other members of the industry), appeal on remand, 722 F.2d 1238, 1242 (affirming remittitur of punitive award to $450,000), modified on other grounds, 727 F.2d 350 (5th Cir. 1984).

Second, BMW's policy comports with the statutory disclosure thresholds of numerous states, including now even Alabama.[12] When the Alabama Legislature has joined ranks

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[12] At present 22 states have disclosure statutes that do not require disclosure of refinishing costing less than 3% of MSRP. See Ala. Code § 8-19-5(22)(c) (3% of MSRP or $500, whichever is greater); Ariz. Rev. Stat. Ann. § 28-1304.03 (3% of MSRP); Ark. Code Ann. § 23-112-705 (6% of sticker price); Cal. Veh. Code §§ 9990-9991 (3% of MSRP or $500, whichever is greater); Idaho Code § 49-1624 (6% of MSRP); 1994 Ill. Legis. Serv. P.A. 88-581 (6% of MSRP) (to be codified at Ill. Comp. Stat. ch. 815, § 710/5); Ind. Code Ann. §§ 9-23-4-4, 9-23-4-5 (4% of MSRP); Iowa Code Ann. § 321.69 ($3,000); Ky. Rev. Stat. Ann. § 190.0491(5) (6% of sticker price); La. Rev. Stat. Ann. § 32:1260 (6% of MSRP); Minn. Stat. Ann. § 325F.664 (4% of MSRP or $500, whichever is greater); Miss. Motor Vehicle Comm'n Reg. § 1 (filed Aug. 19, 1992) (6% of MSRP); N.H. Rev. Stat. Ann. § 357-C:5(III)(d) (6% of MSRP); N.Y. Gen. Bus. Law § 396-p(5)(a), (d) (5% of lesser of MSRP or distributor's suggested retail price); N.C. Gen. Stat. § 20-305.1(d)(5a) (3% of MSRP); Ohio Rev. Code Ann. § 4517.61 (6% of MSRP); Okla. Stat. Ann. tit. 47, § 1112.1 (3% of MSRP or $500, whichever is greater); R.I. Gen. Laws § 31-5.1-18(d) (6% of MSRP); Vt. Stat. Ann. tit. 9, § 4087(d) (5% of first $10,000 of MSRP and 2% of any amount above $10,000); Va. Code Ann. § 46.2-1571(D) (3% of MSRP); Wis. Admin. Code § Transp. 139.05(6) (6% of MSRP); Wyo. Stat. § 31-16-115 (6% of MSRP). To our knowledge, no more than three states even arguably require

(continued...)

with the vast majority of other states to legislate on the subject and has concluded that the nondisclosure of repairs costing less than 3% of MSRP is neither an unfair trade practice nor a material misrepresentation or omission of fact, the notion that BMW's use of that very same 3% threshold is sufficiently egregious to merit any punishment, let alone a $2 million imposition, is preposterous. (It reflects, at bottom, the absurd conclusion that 22 states have authorized the defrauding of their citizens.)

In this regard, the present case bears similarity to the common situation in which a defendant is sued for damages even though its conduct met federal safety standards. Although compliance with such standards might not be a defense to liability for compensatory damages, several lower courts have held that it generally is inconsistent with a finding that the conduct is reprehensible and hence weighs strongly against imposition of *any* punitive damages. See, *e.g.*, *Richards* v. *Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (finding insufficient evidence to support imposition of punitive damages in light of defendant's compliance with federal safety standards); *Sloman* v. *Tambrands, Inc.*, 841 F. Supp. 699, 703-704 n.8 (D. Md. 1993) (compliance with federal regulations precludes finding of malice and

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[12] (...continued)
disclosure of refinishing costing less than 3% of MSRP. See Fla. Stat. Ann. § 320.27(9)(n) (*dealer* must disclose repairs costing more than 3% of MSRP of which it has actual knowledge, but must disclose repairs involving application of "touch-up paint" if the cost of the touch-up paint application exceeds $100); Ga. Code Ann. § 40-1-5(b), (c), (d) & (e) (requiring disclosure of paint repairs costing more than $500); Or. Rev. Stat. § 650.155 (requiring manufacturer to disclose nature and extent of all "post-manufacturing repairs"). The remaining 25 states and the District of Columbia do not appear to have addressed the subject by statute or regulation.

necessitates entry of summary judgment on claim for punitive damages); *Stone Man, Inc.* v. *Green*, 435 S.E.2d 205, 206 (Ga. 1993) (holding that as a general rule punitive damages are improper when a defendant has complied with environmental or safety regulations). See also Note, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175, 200 (1989) ("regulatory compliance should in most cases bar an award of punitive damages against a manufacturer").

Third, it is common in the product liability, mass disaster, and consumer fraud contexts for numerous lawsuits to arise out of the same alleged act of misconduct. The lawsuits often involve the same theories of liability, the same evidence, and even the same attorneys. In such circumstances, the outcome of other trials is a useful benchmark for measuring the reasonableness of any particular punitive award. For instance, if three juries impose punitive damages in the $200,000 to $300,000 range in cases involving similar allegations and evidence, the fact that the three exactions are tightly clustered is an indication that the awards are not unreasonable. By contrast, if a fourth jury were thereafter to impose a $4 million punishment in a similar case, the massive disparity in outcomes would be a powerful indication that the fourth verdict is unreasonable.

The present case involves just such a disparity. The jury in the *Yates* case imposed no punitive damages at all. What is more, the jury in *this* case indicated its unambiguous conclusion that the appropriate penalty was $4,000 for each car for which it was entitled to punish. When one jury does not even believe that the conduct is bad enough to pass the threshold for imposition of punitive damages and another jury (in the case under review) concludes that proper punishment is $4,000 per transaction, that is compelling evidence that a punishment of $2 million (which amounts to over $140,000 per Alabama transaction) is patently unreasonable.

Fourth, conduct is objectively more reprehensible when the defendant is on notice that others consider it wrongful, either because the conduct is *malum in se* — that is, universally understood to be wrongful — or because there have been prior judgments imposing liability for that conduct. Here, the conduct is not *malum in se*. To the contrary, the vast majority of state legislatures to adopt standards governing the subject have set the disclosure threshold at no less than 3% of MSRP. See note 12, *supra*. What is more, the record in this case reflects that, at the time of the sale of Dr. Gore's car, BMW had never even been sued, let alone held liable, with regard to its policy of not disclosing repairs costing less than 3% of MSRP. R. 1012.[13] BMW had no indication before the *Yates* verdict — which was rendered over two years after Dr. Gore purchased his car — that its 3% threshold would be deemed to violate the common law of any state, including Alabama. Because BMW's 3% threshold was fully consistent with the disclosure statutes of numerous states and because BMW had no other reason to expect that its use of such a threshold would be found fraudulent under Alabama common law, a seven-figure punitive exaction is far out of line.

Fifth, administrative fines for comparable conduct supply an extremely valuable benchmark for assessing the reasonableness of a punitive award. Here, the Alabama Legislature has set the maximum civil penalty for violations of its Deceptive Trade Practices Act at $2,000 per violation. Ala. Code § 8-19-11(b). The punishment selected by the Alabama Supreme Court is **1,000** times that amount.[14]

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[13] Nor has research disclosed any case in which any other manufacturer had been found to have committed fraud for similar conduct.

[14] This Court has indicated that a lack of proportionality (continued...)

2. Relationship to the harm or potential harm to the plaintiff

The *TXO* plurality indicated that the relationship between the punitive damages and compensatory damages is a relevant, albeit not dispositive, consideration. 113 S. Ct. at 2721. For example, because the compensatory damages may understate the potential harm to the plaintiff from the defendant's misconduct, it is also appropriate to consider the relationship between the punitive damages and the potential harm. *Id.* at 2721-2722.

Here, there was no evidence of any potential, but unrealized, harm to Dr. Gore. The $4,000 compensatory award reflects the full amount claimed by Dr. Gore as his actual (and potential) damages. Accordingly, the appropriate focus in this case is on the ratio between the punitive and compensatory awards.

The ratio of the punitive damages (as reduced by the Alabama Supreme Court) to the compensatory award in this case is a staggering **500:1**. Moreover, the punishment is a remarkable **35** times the harm to all 14 Alabama purchasers combined (assuming average compensatory damages of

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[14] (...continued)
between the size of a punitive exaction and the amount of a *criminal fine* for analogous conduct is not dispositive of the excessiveness inquiry because criminal conduct typically also is punishable by imprisonment. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 (1991). That does not mean, of course, that the criminal fines for similar misconduct are irrelevant to the inquiry. Moreover, the *Haslip* reasoning obviously has no application to civil penalties, which, by definition, do not encompass incarceration.

$4,000).[15] This Court found a 4:1 ratio of punitive to compensatory damages to be "close to the line" in *Haslip*, 499 U.S. at 23. And in *TXO* the plurality found "the shock[]" of the 526:1 ratio of punitive to compensatory damages to dissipate only because the ratio of punitive damages to the potential harm to the plaintiff was *at most* 10:1. 113 S. Ct. at 2722. Here, there is no uncompensated potential harm to dissipate the shock of the 500:1 (or 35:1) ratio of punitive to compensatory damages. Indeed, as indicated above, it is clear from the record that the ratio is a direct result of the jury's improper effort to punish BMW for all of the 1,000 refinished cars it had sold nationwide and hence has nothing at all to do with the potential harm to Dr. Gore. The 500:1 (or 35:1) ratio accordingly constitutes a powerful measure of the disproportionality of the punishment in this case.

3. Comparable cases

The *TXO* plurality rejected the use of a comparative analysis "*as a test* for assessing whether a particular punitive award is presumptively unconstitutional." 113 S. Ct. at 2720 (emphasis in original). At the same time, it took pains not to "rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations * * *." *Ibid.*

This is such a case. Justice Houston performed a comparative analysis and concluded that inflation-adjusted punitive damages awards in Alabama cases involving fraud in

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[15] Application of a 35:1 ratio to the totality of the 1,000 cars sold nationwide would yield a punishment of **$140 million**. We submit that not even the staunchest defender of punitive damages could contend that it would be appropriate to mulct BMW in this amount for its unitary policy decision to adopt a 3% threshold.

the sale of an automobile ranged from $11,800 to $162,637 and averaged approximately $85,000. App., *infra*, 22a. The $2 million penalty approved by the Alabama Supreme Court is more than 23 times the average derived by Justice Houston and over 12 times the previous high. That kind of gross disparity once again reflects the unreasonableness of the punitive award in this case.

4. Presence or absence of a pattern of misconduct

In finding that the $10 million punishment in *TXO* was not excessive, both the plurality (113 S. Ct. at 2722-2723) and Justice Kennedy (*id.* at 2726) emphasized the evidence that the defendant had engaged in several other acts of misconduct that, along with the conduct for which the petitioner was held liable, formed an overall pattern of oppression.

Evidence that the defendant's overall business practices are permeated by misconduct would provide a ground for concluding that a substantial punishment is necessary to provide adequate deterrence and punishment. By the same token, if the record shows nothing more than the single act, policy, or design decision for which the defendant is being punished, there is far less need for a substantial punishment. That is the case here. The 3% threshold (which, we repeat, is consistent with the disclosure statutes of the vast majority of states to address the subject legislatively) is the product of a unitary policy decision, and there is no evidence in the record of any other misconduct on the part of BMW that would support enhancement of its punishment.

B. Lower Courts Charged With The Task Of Reviewing The Size Of Punitive Damages Awards Under The Due Process Clause Are In Need Of Guidance From This Court.

By now, it hardly needs saying that the number of cases in which punitive damages are awarded and the amount of the punishment imposed in such cases is staggering. The newspapers carry reports of enormous punitive verdicts on a weekly basis. In August, September, and October 1994, for example, juries imposed punitive exactions of **$5 billion** against Exxon; **$109 million** against Blockbuster Entertainment Corp.; **$80 million** against Hughes Aircraft; **$70 million** against a director of Amerco, the corporate parent of U-Haul; **$65 million** against the Southern California Physicians Insurance Exchange; **$58 million** against Maryland Casualty Co.; **$57.5 million** against Key Pharmaceutical; **$50 million** against Mercury Finance; **$31 million** against Chevron U.S.A.; **$15 million** against Merrell Dow Pharmaceuticals, Inc.; **$8 million** against Schering-Plough Corp.; **$7 million** against Nash Finch Co.; **$6.9 million** against the law firm Baker & McKenzie; **$6.6 million** against Farmers Insurance Co.; **$6.5 million** against Wal-Mart; **$5 million** against the Hilton Hotel Corporation; and **$2.7 million** against McDonald's.[16]

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[16] See Schneider, *Exxon Is Ordered to Pay $5 Billion for Alaska Spill*, N.Y. Times, Sept. 17, 1994, at 1; *Blockbuster Busted for $123.6 Million*, Nat'l L.J., Sept. 26, 1994, at A13; Silverstein, *Jury Awards $89.5 Million in Hughes Race Bias Lawsuit*, L.A. Times, Oct. 24, 1994, at D1; *Shareholder Group Awarded $1.47 Billion in U-Haul Suit*, N.Y. Times, Oct. 12, 1994, at D5; *Insurance Exchange Must Pay $70.7 M*, UPI, Aug. 11, 1994; *Jury Orders Insurer to Pay $61 Million to Manufacturer*, Orlando Sentinel, Nov. 3, 1994, at (continued...)

For its part, Alabama is among the nation's leaders in both the number and the size of its punitive damages awards. Statistics compiled by Jury Verdict Research reflect that Alabama juries award punitive damages **ten** times more often than juries in the country as a whole; moreover, the average punitive exaction in Alabama is more than **three** times the national median and roughly **eleven** times the average punitive sanction imposed in neighboring Georgia. Bueno, *As Alabama Juries Punish Business, Business Seeks to Punish the Judge*, Wall St. J., Nov. 2, 1994, at S1.

Trial and appellate courts often order remittiturs of punitive awards, but typically there is no rhyme or reason either to their decision as to whether a particular punishment is excessive or to their conclusion as to what a permissible amount would be. The court below, for example, is notorious for mouthing its *Green Oil* standards and then cutting the punitive award in half or picking some other

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[16] (...continued)
A20; *Drug Makers Liable for Brain-Damaged Student*, Nat'l L.J., Sept. 26, 1994, at A13; *Alabama Jury Awards $50 Million Punitive Damages to Car Buyer*, Chi. Trib., Aug. 9, 1994, at 1; *Chevron U.S.A. Slapped for Breach of Contract*, Nat'l L.J., Oct. 3, 1994, at A21; *Drug Co. Liable for Boy's Birth Defect*, Pa. L. Wkly., Oct. 10, 1994, at 4; *Ex-Schering Salesman Gets $8.4 Million in Bias Suit*, Wall St. J., Oct. 31, 1994, at B10; *Korean Denied Promotion Wins Civil Rights Case*, Nat'l L.J., Oct. 31, 1994, at A11; Chiang, *$7.1 Million Harassment Penalty Raises Questions*, S.F. Chron., Sept. 8, 1994, at A1; *$7.2 Million Verdict Favors Altadena Pair*, L.A. Times, Oct. 13, 1994, at J3; *Wal-Mart Held Liable for Promissory Estoppel*, Nat'l L.J., Oct. 3, 1994, at A21; *Woman Wins $5 Million for Tailhook*, N.Y. Times, Nov. 1, 1994, at A24; *Big Jury Award for Coffee Burn*, N.Y. Times, Aug. 19, 1994, at D5.

equally arbitrary figure without any explanation whatever.[17] Other courts have been more forthright in expressing the need for guidance in conducting the excessiveness inquiry. For instance, a member of the Georgia Court of Appeals recently complained in a case involving a $101 million punitive judgment that "there is a great dearth of objectivity in the analysis or evaluation of punitive damages awards in Georgia. Our law provides much platitude and little guidance for determining an award of punitive damages." *General Motors Corp.* v. *Moseley*, 447 S.E. 2d 302, 315 (1994) (Banke, J., concurring). And speaking more generically of the need of all states for concrete guidance from this Court, the West Virginia Supreme Court has stated:

> State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill.
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> We must remember that although *Haslip* may not have created the clear, bright-line rules that we would all like, it is the beginning of national

[17] See, *e.g.*, App., *infra*, 21a (cutting punitive award in half); *Northwestern Mut. Life Ins. Co.* v. *Sheridan*, 630 So. 2d 384, 395 (1993) (cutting punitive award in half); *Alabama Power Co.* v. *Turner*, 575 So. 2d 551, 558 (cutting $5 million punitive award to $3.5 million), cert. denied, 500 U.S. 953 (1991); *United Servs. Auto. Ass'n* v. *Wade*, 544 So. 2d 906, 917 (1989) (cutting $3.5 million punitive award to $2.5 million).

> common law development in this area and not the end.

Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 905, 907 (1991).

As indicated, the instant case involves several objective indicia of excessiveness that arise with regularity in punitive damages litigation. It accordingly presents an excellent opportunity to provide the guidance that the lower federal and state courts manifestly need.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Alabama Supreme Court should be summarily reversed. Alternatively, the Court should grant plenary review of the judgment below.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1994

1920324 and 1920325

BMW of North America, Inc.

v.

Ira Gore, Jr.

Bayerische Motoren Werke, A.G.

v.

Ira Gore, Jr.

Appeals from Jefferson Circuit Court
(CV-90-9658)

On Application for Rehearing

PER CURIAM.

The opinion released October 29, 1993, is hereby withdrawn and the following opinion is substituted therefor.

The primary issues presented by these appeals are (1) whether a German automobile manufacturer had sufficient contacts with Alabama to permit the courts of this state to exercise personal jurisdiction over it, and (2) whether a jury's award of $4,000,000 in punitive damages against the manufacturer and its distributor is excessive.

The appeals are by BMW of North America, Inc. ("BMW NA"), and Bayerische Motoren Werke, Aktiengesellschaft ("BMW AG") from a judgment entered on a jury verdict awarding the plaintiff, Dr. Ira Gore, Jr., compensatory damages of $4,000 and punitive damages of $4,000,000. The specific issues presented in regard to the excessiveness question are: (1) Whether punitive damages were properly assessed, and, if so, whether the amount of the award is excessive; and (2) whether, without evidence that any state other than Alabama requires disclosure of minor cosmetic repairs by a manufacturer, the trial court erred in admitting evidence that BMW NA had sold 983 vehicles throughout the country that had incurred damage similar to that incurred by Gore's automobile and that had been repaired without BMW NA's disclosing that it had made repairs.

As to BMW NA, we have considered the oral arguments of the parties and the briefs of the parties and the *amicus curiae* briefs, and we have reviewed the verdict according to the principles set out in *Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989), *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.*, ___ U.S. ___, 113 S. Ct. 2711 (1993). After thoroughly and carefully reviewing the record and verdict, considering the gravity of the wrong and the nature and extent of the injury inflicted upon the plaintiff, and comparing the punitive damages award in this case with other awards allowed in similar cases involving the sale of automobiles, we hold that the trial court's order denying BMW NA's motion for a new trial is due to be affirmed on the condition that the plaintiff file with this Court within 21 days a remittitur of damages of $2,000,000. Otherwise, the judgment will be reversed and this cause remanded for a new trial.

Facts

The plaintiff, Dr. Ira Gore, Jr., bought a new 1990 BMW 535i automobile from German Auto, Inc., a Birmingham dealership, for $40,750.88. He had no direct dealings with either BMW AG or BMW NA. At the time of the sale, Dr. Gore, a graduate of Harvard College and Duke Medical School, signed a "Retail Buyers Order" and an "Acknowledgement of Disclosure" in which he acknowledged that the automobile might have sustained damage at some point and that he had inspected it and had agreed to accept it. This disclosure form did not list the repair that is the subject of this action. Gore drove the car for approximately nine months before taking it to "Slick Finish," an independent automobile detailing shop, to make the car look "snazzier than it normally would appear," even though he was not unsatisfied with the car's appearance and had not noticed any flaws in the finish on the car.

The detailer informed Gore that the car had been partially refinished; Gore later determined that the refinishing had been done because of acid rain damage to the car's paint finish sustained during transit between BMW AG's manufacturing plant in Germany and BMW NA's vehicle preparation center in Brunswick, Georgia. BMW NA, the American distributor of BMW automobiles, had adopted a company policy that it would not disclose any damage to a dealer or to a customer if the cost of repairing the damage was less than three percent of the manufacturer's suggested retail price (MSRP). The cost of refinishing Gore's automobile was $601, less than three percent of the MSRP; consequently, BMW NA did not disclose that the automobile had been refinished. The jury found that the damage devalued the car by $4,000 or about 10 percent of the price paid by Gore.

Upon his discovery that the automobile had been refinished, Gore sued German Auto, BMW AG, and BMW NA, alleging that the failure to disclose the refinishing

constituted fraud, suppression of a material fact, and breach of contract. With respect to the BMW defendants, only the suppression claim was submitted to the jury. The jury returned a verdict against all three defendants for $4,000 in compensatory damages, and it assessed $4,000,000 in punitive damages against the BMW defendants jointly, based on a determination that the BMW defendants had been guilty of gross, malicious, intentional, and wanton fraud. The trial court entered a judgment on that verdict and subsequently denied post-judgment motions filed by the BMW defendants, after reviewing the verdict under the *Hammond* and *Green Oil* standards. The BMW defendants appealed.

I

First, we address the contentions of BMW AG. BMW AG is the German manufacturer of BMW automobiles, including Gore's 1990 BMW 535i. BMW AG does not sell automobiles directly to consumers. It sells automobiles in Germany to distributors, including BMW NA. The distributors then sell the automobiles to authorized BMW dealers, who in turn sell the automobiles to the ultimate consumers. BMW AG is a separate legal entity from BMW NA. BMW AG relinquishes all ownership, control, and liability for the automobiles it manufactures when it sells them to distributors such as BMW NA.

BMW AG argues that it is a foreign corporation, entirely separate from BMW NA, and that it lacks sufficient contacts with Alabama to allow Alabama courts to exercise personal jurisdiction over it. BMW AG also argues that Gore's automobile had become the property of BMW NA long before any refinishing or other repairs were performed.

It is undisputed that BMW AG did not know of BMW NA's three percent damage disclosure policy, and there was no evidence presented to show a legal relationship between BMW AG and BMW NA that would support a finding that BMW AG had such contacts with Alabama that it would be

"fair and reasonable to require [BMW AG] to come to this state to defend [this] action." Rule 4.2(a)(2)(I), Ala. R. Civ. P. In *Ex parte Pope Chevrolet, Inc.*, 555 So. 2d 109 (Ala. 1989), this Court discussed at length the tests to be applied when applying the provisions of Rule 4, and there adopted what could be called the "purposeful availment" and "stream of commerce" tests in applying the minimum contacts rule, following the principles stated in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980).

Based on our examination of the applicable law, and in view of the particular facts and circumstances of this case, we find insufficient evidence to support a finding that BMW AG was the alter ego of BMW NA or that it knowingly and intentionally suppressed any fact upon which Gore's claim was based. We need not address whether BMW AG, if the facts were different, could be subject to suit in Alabama. We conclude, therefore, that BMW AG did not have such contacts with the State of Alabama that it would be fair and reasonable to require it to come to this state and defend against this particular action. The trial court should have granted BMW AG's motions to dismiss, for a directed verdict, and for a J.N.O.V. We, therefore, reverse the judgment as to BMW AG and enter a judgment for that defendant.[1]

II

We now consider the arguments of BMW NA. It first argues that there is no evidence, much less "clear and convincing evidence that [BMW NA] consciously or

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[1] Our holding as to BMW AG is consistent with the result reached in *Yates* v. *BMW of North America, Inc.*, [Ms. 2910714, April 2, 1993] ___ So. 2d ___ (Ala. Civ. App.), cert. quashed, [Ms. 1921062, October 29, 1993] ___ So.2d ___ (Ala. 1993), involving the same defendants and almost identical facts, where BMW AG was dismissed as a defendant.

deliberately engaged in oppression, fraud, wantonness or malice with regard to the plaintiff," as required by Ala. Code 1975, § 6-11-20, to assess punitive damages. BMW NA contends that it presented substantial evidence of a good faith belief that refinished vehicles suffer no diminution in value. BMW NA also argues that the three percent standard for nondisclosure of defects is customary in the automobile manufacturing industry and that it adopted this standard so that it would be in compliance with various state laws defining what constitutes sufficient damage to a new vehicle that the manufacturer, distributor, or dealer would be obligated to disclose under the provisions of consumer protection laws.

Alabama had no such law at the time of the events giving rise to this action, but during its 1993 Regular Session, the Alabama Legislature enacted Act No. 93-203, Ala. Acts 1993, which the Governor signed into law, to require manufacturers to disclose those repairs costing more than the greater of $500 or three percent of the MSRP:

> "c. For purposes of this section, 'material damage' means damage sustained or incurred by a motor vehicle, whether corrected or uncorrected, which cost to repair exceeds three percent of the manufacturer's suggested retail price of the vehicle based upon the dealer's retail repair cost or the sum of $500, whichever is greater. Damage to tires, glass, bumpers, and in-dash audio equipment shall not be considered in determining the cost of repair if those components are replaced by identical manufacturer's original equipment. The failure of a manufacturer, importer, distributor, or motor vehicle dealer to give notice of damage below the threshold constituting 'material damage' shall not provide grounds for revocation of the sale nor shall such failure constitute a material misrepresentation or omission of fact."

Ala. Code 1975, § 8-19-5. We cannot agree with BMW NA's arguments. The public policy of Alabama expressed in the statute had not been enacted at the time BMW NA adopted its policy of nondisclosure. After considering the evidence in the record, we conclude that there was sufficient evidence for the jury to find that BMW NA intentionally and willfully suppressed the fact that the automobile had been repaired.[2]

III

We next discuss BMW NA's claim that the trial court erred in admitting evidence that BMW NA had sold 983 vehicles throughout the United States without disclosing that it had refinished them. BMW NA contends that "a false representation which is not a fraud is not admissible in evidence under a rule which renders similar frauds admissible as proof of the fraud charged." 37 Am. Jur. 2d *Fraud and Deceit* § 456, at 629-30 (1968). BMW NA claims that it is entitled to a new trial, as was granted in *Courtesy Ford Sales, Inc.* v. *Clark*, 425 So. 2d 1075 (Ala. 1983), because of the admission of evidence of other sales by the defendant. BMW NA argues that, at most, only 14 of the 983 sales were in Alabama, and that there was no evidence presented to indicate that the sales made in other states would have been fraudulent or wrongful. On the contrary, BMW NA contends that most of those sales were not fraudulent under applicable state law.

Gore responds to this argument by saying that whether the trial court should have granted a new trial is largely discretionary and that the evidence that 983 vehicles were refinished and sold to customers without disclosing the repair

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[2] In view of the jury finding that the value of the automobile was diminished by $4,000, and in view of the fact that a jury in *Yates*, awarded compensatory damages of $4,600, the three percent cost of repair may not have been a proper yardstick by which to measure whether a disclosure should be made.

was highly relevant and material. The record shows that the parties stipulated that 983 vehicles were refinished, but they dispute whether there was a proper objection to the admission of this evidence. We review it on the assumption that there was a proper objection made.

It is apparent from an examination of the transcript that Gore's theory for the admissibility of the work orders for repair of other vehicles was "to aid Gore in meeting [his] burden of [proving] intent, willfulness, pattern, practice, for damage purposes." Gore also disputes BMW NA's claim that the *Courtesy Ford* case is dispositive of this issue, because, Gore argues, there was no evidence presented in that case to indicate that the facts and circumstances surrounding the other sales were factually similar to those surrounding the sale at issue. We agree with Gore. We believe that the evidence in this case was sufficient to show that BMW NA, on 983 occasions, shipped new vehicles to dealers without disclosing to the dealers that the vehicles had been refinished. Consequently, we conclude that the trial court did not err by admitting these other instances in the trial of this case, even though the conduct might not have been fraudulent under the law of the other states.

IV

BMW NA's chief argument is that the punitive damages award is excessive when measured by the factors stated in *Green Oil Co.* v. *Hornsby* because: (1) the award of punitive damages is 1,000 times the award of compensatory damages and bears no reasonable relationship to the risk of harm, which is purely economic; (2) BMW NA's conduct was much less reprehensible than that of defendants in other cases in which juries made much smaller damages awards; (3) it did not profit from its nondisclosure, because German Auto paid full price for the car; (4) the fact that it has a substantial net worth does not alone justify an exorbitant award; and (5)

Gore never tried to resolve the matter without resorting to litigation.

In *Green Oil*, this Court commented on the purpose of punitive damages and set out some of the factors that the trial court should consider in reviewing a punitive damages award that the defendant claims is excessive. Regarding the purpose of punitive damages, the Court said:

> "Because the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future, the proper amount of punitive damages rests largely within the jury's discretion. However, although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Maryland Casualty Co.* v. *Tiffin*, 537 So. 2d 469 (Ala. 1988); *City Bank of Alabama* v. *Eskridge*, [521 So. 2d 931 (Ala. 1988)]; *Roberson* v. *Ammons*, 477 So. 2d 957 (Ala. 1985)."

539 So. 2d at 222.

This Court also stated in *Green Oil*:

> "'The following could be taken into consideration by the trial court in determining whether the jury award of punitive damages is excessive or inadequate:
>
> "'(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"'(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

"'(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

"'(4) The financial position of the defendant would be relevant.

"'(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"'(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"'(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.'"

539 So. 2d at 538-39 (quoting *Aetna Life Insurance Co.* v. *Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)).

We now review the jury verdict and the judgment entered by the trial court with those factors in mind, saving for last a discussion of whether the punitive damages award bears a

reasonable relationship to the harm actually caused or likely to be caused by the defendant.

The Reprehensibility of the Defendant's Conduct

In determining the degree of reprehensibility of BMW NA's conduct, we have considered the duration of that conduct, the degree of BMW NA's awareness of any hazard that its conduct caused or was likely to cause, any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct. All are relevant in determining the degree of reprehensibility.

BMW NA argues that there is no evidence that its adoption of the nondisclosure policy was "gross, oppressive or malicious." It says that it adopted the nondisclosure policy in good faith and it presented evidence that it followed industry custom in the nondisclosure of repairs such as those involved in this case. Gore, on the other hand, contends that BMW NA consciously adopted the nondisclosure policy at a time when it knew that the law of 35 states would have required disclosure of this material fact. As this case shows, this jury and another jury thought the "cost of repair" policy did not correspond with actual diminution in value.

The evidence shows that BMW adopted the policy of nondisclosure in 1983 and that the policy applied to the sale of all automobiles in all states. Based on this evidence, we conclude that Gore satisfactorily proved that BMW NA engaged in a pattern and practice of knowingly failing to disclose damage to new cars, even though the damage affected their value, and that BMW NA followed this policy for several years. Based on that evidence, we conclude the Gore satisfied the burden placed on him to show that BMW NA's conduct was reprehensible.

Was the Conduct Profitable to BMW NA?

The next issue we address is whether the conduct was profitable to BMW NA. The evidence shows that it was. In

fact, the jury awarded Gore $4,000 in compensatory damages.

One of the purposes for assessing punitive damages is to remove the profit resulting from a fraud or misrepresentation. Punitive damages should be in excess of the profit, so that the wrongdoer recognizes a loss. We find that the evidence was legally sufficient to withstand a directed verdict motion; therefore, it was a jury question whether that evidence produced "in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion"; see Ala. Code 1975, § 6-11-20(b)(4).

The Financial Position of BMW NA

It is clear from the evidence that the $4 million judgment would not have a substantial impact upon BMW NA's financial position.

The Costs of the Litigation

In reviewing whether a particular punitive damages award is excessive, the public policy of this state is to consider the costs of litigation and to encourage plaintiffs to bring wrongdoers to trial. *See, e.g., Smith* v. *States General Life Ins. Co.*, 592 So. 2d 1021 (Ala. 1992). In our review of this verdict we have considered the fact that the costs associated with this trial were substantial. We have given due consideration to that fact, in keeping with our application of the *Hammond* and *Green Oil* factors.

Criminal Sanctions

If criminal sanctions have been imposed on the defendant for the conduct made the basis for the award of punitive damages, *Hammond* and *Green Oil* require that this fact be taken into account in mitigation of the punitive damages

award. No criminal sanctions have been imposed on BMW NA for this conduct.[3]

Other Civil Actions

If there have been other civil actions against the same defendant, based on the same conduct, this fact should be taken into account in mitigation of the punitive damages award. BMW NA, in an appendix to its brief, states that Gore's counsel in this case has filed 24 other actions against BMW NA in Alabama and Georgia.[4] In one of those

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[3] In *Yates*, see note 1, the jury awarded no punitive damages.

[4] *Actions Filed by Gore's Counsel Against BMW NA*:

Alabama

1. *Yates* v. *BMW of North America, Inc.*, No. CV-90-2533 (Jefferson Cir. Ct., Apr. 6, 1990).

2. *Gore* v. *Bayerische Motoren Werke A.G.*, No. CV-90-9658 (Jefferson Cir. Ct., Dec. 17, 1990).

3. *Wilkinson* v. *Bayerische Motoren Werke A.G.*, No. CV-92-896 (Tuscaloosa Cir. Ct., July 23, 1992).

4. *Goode* v. *BMW of North America, Inc.*, No. CV-92-6498 (Jefferson Cir. Ct., Aug. 13, 1992).

5. *Barnes* v. *BMW of North America, Inc.*, No. CV-92-8683 (Jefferson Cir. Ct., Nov. 5, 1992).

6. *Rutkowski* v. *BMW of North America, Inc.*, No. CV-92-241 (Coffee Cir. Ct., Nov. 17, 1992).

7. *McGowin* v. *Bayerische Motoren Werke A.G.*, No. CV-92-3976 (Mobile Cir. Ct., Dec. 10, 1990).

8. *Evans* v. *Bayerische Motoren Werke A.G.*, No. CV-92-3975 (Mobile Cir. Ct., Dec. 10, 1990).

9. *Clark* v. *BMW of North America, Inc.*, No. CV-92-616 (Morgan Cir. Ct., Dec. 22, 1992).

10. *Jones* v. *BMW of North America, Inc.*, No. CV-93-H-202-E (N.D. Ala.; removed Jan. 28, 1993).

Georgia

11. *Lassiter* v. *Bayerische Motoren Werke A.G.*, No. CV-E-3990 (Fulton Cty. Super. Ct., July 28, 1992).

actions, *Yates* v. *BMW of North America, Inc.*, [Ms. 2910714, April 2, 1993] ___ So. 2d ___, (Ala. Civ. App.), cert. quashed, [Ms. 1921062, October 29, 1993] ___ So. 2d ___, the case was tried by a jury in the same circuit in which this case was tried, but that jury, while awarding a similar amount of compensatory damages, awarded *zero* punitive damages.

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12. *Lee* v. *Bayerische Motoren Werke A.G.*, No. CV-92-17709-18 (Cobb Cty. Super. Ct., Nov. 4, 1992).

13. *Gershon* v. *Bayerische Motoren Werke A.G.*, No. CV-E-4119 (Fulton Cty. Super. Ct., Aug. 5, 1992).

14. *Higgins* v. *Bayerische Motoren Werke A.G.*, No. 9216480-18 (Cobb Cty. Super. Ct., Sept. 17, 1992).

15. *Rivers* v. *Bayerische Motoren Werke A.G.*, No. 92-7173-2 (DeKalb Cty. Super. Ct., July 6, 1992).

16. *Dempsey* v. *Bayerische Motoren Werke A.G.*, No. SUP-92-CV-2007 (Clarke Cty. Super. Ct., Nov. 2, 1992).

17. *Caller* v. *BMW of North America, Inc.*, No. 93vs67839B (Fulton Cty. State Ct., Jan. 15, 1993).

18. *Fisher* v. *BMW of North America, Inc.*, No. 93vs67842F (Fulton Cty. State Ct., Jan. 15, 1993).

19. *Harmon* v. *BMW of North America, Inc.*, No. 93vs67841C (Fulton Cty. State Ct., Jan. 15, 1993).

20. *Kaufmann* v. *BMW of North America, Inc.*, No. 93vs67843H (Fulton Cty. State Ct., Jan. 15, 1993).

21. *O'Dell* v. *BMW of North America, Inc.*, No. 93vs67847B (Fulton Cty. State Ct., Jan. 15, 1993).

22. *Simmons* v. *BMW of North America, Inc.*, No. 93vs67844A (Fulton Cty. State Ct., Jan. 15, 1993).

23. *Thornton* v. *BMW of North America, Inc.*, No. 93vs0067736 (Fulton Cty. State Ct., Jan. 15, 1993).

24. *White* v. *BMW of North America, Inc.*, No. 93vs67846C (Fulton Cty. State Ct., Jan. 15, 1993).

25. *Sehgal* v. *BMW of North America, Inc.*, No. 93vs67869 (Fulton Cty. State Ct., Jan. 21, 1993).

In *Yates*, the purchaser was a doctor, as here. In *Yates*, the jury heard evidence of BMW NA's policy of nondisclosure and of the number of vehicles sold throughout the United States that had had some repair work done on them before they were sold as new automobiles. However, in *Yates*, the jury, although it received similar instructions on the issue of punitive damages, awarded none.[5] This Court views the disparity between the two jury verdicts -- $4 million in punitive damages in this case, and $0 in the *Yates* case -- as a reflection of the inherent uncertainty of the trial process and a result of the fact that the cases were tried differently to different juries and at different times. Despite similarities, the trial in *Yates* was not identical to the trial in the case before us. The conclusions reached by 12 different persons upon hearing different evidence that was argued differently cannot dictate the conclusion of the jury in this case.

The Reasonable Relationship Factor

Did the punitive damages award bear a reasonable relationship to the harm that was likely to occur from the defendant's conduct as well as to the harm that actually occurred? Was the actual or likely harm slight, or was it grievous?

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[5] The report of that case states the following:

> "From the limited record before us, it appears that Yates simply introduced into evidence a bulk exhibit existing of 5,856 repair bills. The bills were introduced to show that BMW NA sold over 5,800 automobiles without disclosing that it had made repairs to them. The exhibit included repairs made over a ten-year period and included automobiles sold throughout the country."

Yates, ___ So.2d at ___.

It seems apparent from the record that the jury's punitive damages award is based upon a multiplication of $4,000 (the diminution in value of the Gore vehicle) times 1,000 (approximately the number of refinished vehicles sold in the United States).

Gore's counsel specifically argued the following during closing:

> "They've taken advantage of nine hundred other people on those cars that were worth more. . . . If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it.
>
> ". . . .
>
> "I urge each and every one of you and hope that each and every one of you has the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it."

Based on these facts and the testimony taken at the post-trial hearing on the excessiveness issue, we must conclude that the award of punitive damages was based in large part on conduct that happened in other jurisdictions. This, BMW NA argues, is a violation of BMW's due process rights and encroaches upon the sovereignty of other states. See, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). Although evidence of similar acts in other jurisdictions is admissible as to the issue of a "pattern and practice" of such acts, see part III, supra, this jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not

be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful.[6]

This Court has recognized that evidence of adherence to industry practice bears importance on the question whether the defendant has acted in good faith and is therefore not subject to exemplary damages. *Thomas* v. *Principal Financial Group*, 566 So. 2d 735 (Ala. 1990); *Richerzhagen*

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[6] The only testimony touching the issue showed that approximately 60% of the vehicles that were refinished were sold in states where failure to disclose the repair was not an unfair trade practice. On direct examination, David Cordero, an employee of BMW NA, who represented BMW AG during the trial, testified as follows:

> "Q. Did you take the — did you take the repair orders that — were introduced or copies of the repair orders that were introduced at the trial of this case and attempt to using a — using BMW's computer system identify the location of the retail dealers who sold those vehicles?
> "A. Yes, yes, we did.
> "Q. Could you tell the Court-could you identify by state those dealers?
> "A. Based on what we did, yes, we could identify by state.
> "Q. Do you recall approximately how many were in Alabama?
> "A. I would say about 11 to 14, something like that.
> "Q. And approximately how many of those repair orders were in states that had these statutes that have been introduced?
> "A. I approximated about 60 percent of those repair orders were in states outside of Alabama – not outside of Alabama, but in those state statutes – disclosure statutes."

(Record at 971-72).

v. *National Home Life Assurance Co. of New York*, 523 So. 2d 344 (Ala. 1988).

This Court has also held that a manufacturer that in good faith repairs a vehicle to "new" specifications should not be found to have engaged in the type of conduct giving rise to punitive damages. *Ford Motor Co.* v. *Burkett*, 494 So. 2d 416 (Ala. 1986). This Court has further held that a vehicle with superficial cosmetic damage, including scratches in the paint and unmatched and uneven paint, was "new" as a matter of law, and on that holding affirmed a judgment based on a directed verdict against a plaintiff claiming fraud. *Wilburn* v. *Larry Savage Chevrolet, Inc.*, 477 So. 2d 384 (Ala. 1985). While reviewing the verdict in this case, we have considered the principles of law contained in these other Alabama cases.

In defending the jury's punitive damages award, Gore argues that the harm is "likely to occur" in the future if the substantial award is not upheld, because the policy of nondisclosure was not changed before the verdict in this case was returned, even though BMW NA had been faced with lawsuits and with requests by dealers that it change the policy. Gore contends that, because of the size of the award, "[f]ive days after this punitive damages verdict, BMW NA adopted a full disclosure policy." In arguing for enforcement of the total jury award, Gore likens the conduct here to that in *TXO Production Corp.* v. *Alliance Resources Corp.*, ___ U.S. ___, 113 S.Ct. 2711 (1993), where the United States Supreme Court considered whether a $10 million punitive damages award in a slander of title action was excessive when the actual damages verdict was only $19,000. The Supreme Court noted that "[w]hile [TXO] stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to [Alliance], in terms of reduced or eliminated royalties payments, had [TXO] succeeded in its illicit scheme." ___ U.S. ___, 113 S.Ct. at 2722.

Likewise, we find a reasonable relationship between the jury's decision to award punitive damages and the number of times BMW NA had engaged in similar conduct, and we find no error in the admission of the evidence that showed how pervasive the nondisclosure policy was and the intent behind BMW NA's adoption of it. However, as we discuss below, when applying the reasonable relationship test to the *amount of punitive damages* to be awarded in this case, we do not consider those acts that occurred in other jurisdictions.

As noted in *Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, the constitutionality of Alabama's punitive damages law rests, in part, on this Court's use of comparative analysis during judicial review of a punitive damages award. Further, although in *TXO Production Corp.* v. *Alliance Resources Corp.*, *supra*, the Supreme Court refused to embrace the comparative analysis method as the sole means for review of a punitive damages award, it noted that analysis was one of the relevant factors to be considered in a review of punitive damages awards.

Accordingly, in reviewing the punitive damages award in this case, we have considered cases from this state, along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser. Although we find the use of comparison cases helpful in determining whether a jury's punitive damages award is excessive in relation to the defendant's conduct, we note that such an analysis is but one step in applying the *Green Oil* factors and is not a substitute for the use of all those factors. We emphasize that the use of an enhanced comparative analysis does not create, and is not intended to create, a mathematical formula incorporating other jury verdicts to produce a readily calculable figure for punitive damages.

As the United States Supreme Court stated in *Haslip*, "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." ___ U.S. at ___, 111 S.Ct. at 1032. Mathematical formulas simply cannot fit the requirement of case-by-case justice that is the cornerstone of our jury system.

The determination of a proper award of punitive damages ultimately turns on the jury's determination of the facts warranting their imposition. Our law governing this Court's deference to the jury's factfinding prerogative is long settled:

> "When a jury is the trier of fact, it is not for the trial judge, nor an appellate court, to attempt to determine with mathematical certainty that all of the various elements of evidence offered by the parties regarding specific costs and credits precisely equal the amount of the jury's verdict. We do not have trial by computer, nor do we have post-trial, or appellate review by the computer. The reviewing court does not substitute its own judgment as to the amount of damages for that of the trier of fact."

G.M. Mosley Contractors, Inc. v. *Phillips*, 487 So. 2d 876, 879 (Ala. 1986). See also *Hollis* v. *Wyrosdick*, 508 So. 2d 704 (Ala. 1987).

> "Upon review of a jury verdict, we presume that the verdict was correct; we review the tendencies of the evidence most favorably to the prevailing party; and we indulge such reasonable inferences as the jury was free to draw from the evidence. We will not overturn a jury verdict unless the evidence against the verdict is so much more credible and convincing to the mind than the evidence supporting the verdict that it clearly indicates that the jury's verdict was wrong and unjust."

Campbell v. *Burns*, 512 So. 2d 1341, 1343 (Ala. 1987) (citation omitted). See also *Ashbee* v. *Brock*, 510 So. 2d 214 (Ala. 1987); and *Jawad* v. *Granade*, 497 So. 2d 471 (Ala. 1986). Taken in this light, a comparative analysis referencing analogous cases provides additional data to be considered in determining whether a particular award is constitutionally reasonable under the requirements of *TXO*, *Haslip*, *Green Oil*, and *Hammond*, supra.

After thoroughly and painstakingly reviewing this jury award in light of the factors discussed above, we hold that a constitutionally reasonable punitive damages award in this case is $2,000,000, and that a remittitur of the $4 million jury verdict is appropriate. Therefore, the trial court's order denying BMW NA's motion for a new trial is affirmed on the condition that the plaintiff file with this Court within 21 days a remittitur of damages in the sum of $2,000,000; otherwise, the judgment will be reversed and this cause remanded for a new trial as to the defendant BMW NA.

1920324 - ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED CONDITIONALLY; APPLICATION OVERRULED.

1920325 - ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND JUDGMENT RENDERED FOR DEFENDANT BMW AG; APPLICATION OVERRULED.

Hornsby, C.J., and Maddox, Shores, Steagall, Kennedy, and Ingram,[7] JJ., concur.

Houston, J., concurs specially.

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[7] Justice Ingram did not sit for the oral arguments, but he listened to the tape of the oral arguments.

HOUSTON, JUSTICE (concurring specially).

This Court has decided one previous case, *American Honda Motor Co.* v. *Boyd*, 475 So.2d 835 (Ala. 1985), that has a fact pattern similar to that of this case and that is significant for comparative analysis. In *American Honda*, a Honda automobile that had its door damaged en route to the United States was sold as new by the dealer after the distributor had repaired the damage at the port of entry. 475 So.2d at 837. The purchasers were not informed of the car's condition before the purchase, but learned of the damage and repair only after the door began to rattle and operate improperly. This Court upheld a general verdict of $65,000, of which the probable punitive damages award was $64,400 (the maximum cost to properly repair the car was $600). *Id.* at 837-38. When adjusted for inflation, the $64,400 awarded in 1985 would equal approximately $85,000 today.

Inflation-adjusted punitive damages awards in the Alabama cases involving fraud in the sale of automobiles range from a low of $11,800[8] to a high of $162,637.[9] The range of inflation-adjusted punitive damages awards in comparable cases from other jurisdictions is similar to, although slightly wider than, the range in Alabama cases. The average inflation-adjusted punitive damages award for the Alabama comparison cases is not much different from the damages award in *American Honda* and is also close to the average of punitive damages awards from comparison cases

[8] *German Auto, Inc.* v. *Tamburello*, 565 So.2d 238 (Ala. 1990) (original punitive damages award of $10,815).

[9] *Mobile Dodge, Inc.* v. *Alford*, 487 So.2d 866 (Ala. 1986) (general verdict of $125,000, treated as if the entire award was for punitive damages).

in other jurisdictions.[10] Consideration of the various awards in comparison cases does allow us to compare the award in this case with the upper ranges of awards in comparison cases. "In remitting a punitive damages award, we must remit only that amount in excess of the maximum amount that a properly functioning jury could have awarded." *Big B, Inc.* v. *Cottingham*, [Ms. 1920746, September 10, 1993] ___ So.2d ___ (Ala. 1993).

Evidence was admitted indicating that BMW NA had sold 983 vehicles throughout the United States without disclosing that it had refinished them. We know that 14 of these vehicles were sold in Alabama, and there was evidence that these sales were fraudulent or wrongful. There was no showing of how many of the sales in other states were fraudulent or wrongful. Therefore, considering the evidence of these other sales, including the 14 instances of concealed repair in Alabama, I conclude that the actions or inactions of BMW NA in connection with these sales would support the majority's award of $2,000,000 in punitive damages.

In regard to *Yates* v. *BMW of North America, Inc.*, [Ms. 2910714, February 19, 1993] ___ So.2d ___ (Ala.Civ.App. 1993), cert. quashed, [Ms. 1921062, October 29, 1993] ___ So.2d ___ (Ala. 1993), I can say only that a punitive damages award lies within the discretion of the jury. Even if the jury finds conduct that would allow it to assess punitive damages,

[10] In comparison cases from other jurisdictions, the amount of inflation-adjusted punitive damages was similar to that of the Alabama cases, ranging from approximately $12,000 (*Mills* v. *Keith Marsh Chevrolet, Inc.*, 549 S.W.2d 604 (Mo.Ct.App. 1977) (original punitive damages award of $5,000)) to approximately $196,000 (*Douglas* v. *Ostermeier*, 2 Cal.Rptr.2d 594 (Cal.Ct.App. 1991) (original punitive damages award of $187,000)). The average inflation-adjusted punitive damages award in the comparison cases from other jurisdictions is approximately $71,000.

it is not required to do so. *Henderson* v. *Alabama Power Co.*, [Ms. 1901875, June 25, 1993] ___ So.2d ___ (Ala. 1993). Yates's case was tried before Gore's was tried; therefore, a failure to award punitive damages to Yates was not based upon BMW NA's having already been punished for this course of conduct by an award of punitive damages in Gore's case. *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). Because evidence of BMW NA's pattern and practice was introduced in each case, an award of punitive damages in either case based upon this pattern and practice would sufficiently punish BMW NA for this conduct, and any additional punishment of BMW NA for this conduct would have serious problems under the United States and Alabama Constitutions. Some courts have refused to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct. See, e.g., *Dunn* v. *Hovic*, 1 F.3d 1371, 1385 (3d Cir. 1993). However, when a punitive damages award is obviously based upon the totality of a defendant's pattern and practice, as it is in this case (evidence that BMW NA sold 983 vehicles in this way; jury found a $4,000 compensable loss for the sale of one such vehicle; jury awarded $4,000,000 in punitive damages; this Court reviewed the punitive damages award and reduced it to $2,000,000), we have in effect held that punishment for this course of conduct by BMW NA in excess of $2,000,000, violates "some" substantive due process. I believe that to allow any additional punitive damages award against BMW NA in regard to the sale of any of the 983 vehicles may violate numerous constitutional rights. The jury has the discretion to award or not to award punitive damages. Therefore, we cannot tell whether Yates's jury did not find conduct that allowed it to assess punitive damages or that the jury, having the right to do so, refused to assess punitive damages, as its virtually uncontrollable discretion allowed it to do.

The *Yates* case and this case are almost identical. The same excellent lawyers represented Yates that represent Gore; the same excellent lawyers represented BMW NA in both cases. Excellent trial judges, in the same judicial circuit, conducted as nearly perfect trials as can be conducted. Each plaintiff was a member of a respected profession; each was a physician. BMW NA was the defendant in each case. How does Gore get $2,000,000 in punitive damages and Yates get nothing in punitive damages? Different juries.

Perhaps Gore, Yates, BMW NA, the citizens of Alabama, and even this Justice will think that something is not right -- that, to paraphrase a Ray Stevens' song of several years ago, Gore got the gold mine and Yates got something else. However, no plaintiff has a right to punitive damages.

Justice Shores, in her special concurrence in *Fuller* v. *Preferred Risk Life Insurance Co.*, 577 So.2d 878, 886 (Ala. 1991), which Justice Steagall and I joined, suggested that a substantial portion of punitive damages awards, after attorney fees and expenses are deducted, be paid to the state general fund or to some special fund that serves a public purpose or advances the cause of justice.

Some Justices have continued to support the transfer of all punitive damages awards, after a deduction for attorney fees and expenses, to the state's general fund. See *Principal Financial Group* v. *Thomas*, 585 So.2d 816, 819-20 (Ala. 1991); *Southern Life & Health Insurance Co.* v. *Turner*, 586 So.2d 854, 859 (Ala. 1991); *Union Mortgage Co.* v. *Barlow*, 595 So.2d 1335, 1348 (Ala. 1992).

In the name of all that is fair, I ask this Court, which has consistently held that plaintiffs have no right to punitive damages, to direct that all or a substantial portion of punitive damages awarded in civil cases, after deducting attorney fees and expenses of litigation, be paid to the state general fund or to some special fund that serves a public purpose or advances the cause of justice. If this is done, then the time-honored

and constitutionally mandated right to trial by jury will not be perceived, insofar as punitive damages is concerned, as Alabama's lottery, as it is now perceived by so many.

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

IRA GORE, JR.,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CASE NO. CV 90-9658
	)	
BAYERISCHE MOTOREN WERKE A G, et al.,	)	
	)	
	)	
DEFENDANTS.	)	

ORDER ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL OR IN THE ALTERNATIVE, MOTION FOR REMITTITUR

The Defendants, BMW of North America, Inc. and Bayerische Motoren Werke A G, filed motions for judgment notwithstanding the verdict, new trial or in the alternative, motions for remittitur on July 10, 1992. The Defendants based their motions on numerous allegations of error on the part of the Court. In addition the Defendants requested and a hearing was conducted to receive additional evidence concerning the punitive damages assessed by the jury.

The Court heard argument of counsel, reviewed the briefs of counsel, received additional evidence to determine the economic impact on the Defendants, and considered the amount of compensatory damages awarded, whether or not the Defendants have been guilty of the same or similar acts in the past, efforts made by the Defendants to remedy the wrong and the opportunity or lack of opportunity the Plaintiff gave the Defendants to remedy the wrong. The Court also considered the directives in *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Harmond* v. *Motors Insurance Corporation*, 493 So.2d 1370 (Ala. 1986); *Alabama State Farm Bureau Mutual Casualty Insurance Company* v. *Griffin*, 493 So.2d 1379 (Ala. 1986); and *Green Oil Company* v. *Hornsby*, 539 So.2d 218, 222-224 (Ala. 1989). After having considered all of these things the Court finds:

1. That the Defendants, based on their own admission, will not suffer an economic impact from the damages awarded.

2. The jury was an average jury composed of sincere, able, concerned, sensitive and mentally acute men and women who performed their sworn duties to the best of their abilities.

3. There is no evidence before the Court of any misconduct, bias, passion, prejudice, corruption, improper motive or cause not consistent with truth and the facts.

4. The jury took ample time to have reasonably considered all of the evidence in the case and made its decision based on the law and evidence in the case and made its decision based on the law and evidence as understood by it. There is always the possibility that another jury could have awarded more damages and yet another less damages. The Court will not speculate as to what another jury would have done. However, the Court's conscience is not shocked by the amount of the verdict in this case.

5. The totality of the circumstances in this case in regard to the relationship of the parties and the alleged misconduct of the Defendants was more than enough to render the Defendants blameworthy. The Court is of the opinion, from the evidence at trial and the post-judgment hearing, that these Defendants were deliberately engaging in a scheme of fraud from which they derived monetary benefits. The Defendants should not be rewarded with monetary benefits accumulated by their wrongful acts.

6. Considering the totality of the circumstances and the character and the degree of the wrong alleged, the jury was justified in awarding sufficient damages to prevent similar wrongs in the future, especially in light of the fact that this verdict may have little if any impact on these Defendants.

7. The Court has considered the factors in *Green Oil*, supra. The punitive damages bear a reasonable relationship to the harm that actually occurred. The conduct of the Defendants had gone on for several years based on an intentional act. Also, the financial position of the Defendants would not be relevant in this case because the damages awarded would not affect the Defendants financial position in this case standing alone.

Based on the above factors, the Court OVERRULES and DENIES the Defendants motions for judgment notwithstanding the verdict, new trial and for remittitur.

DONE AND ORDERED this the 8th day of October, 1992.

/s/
Wayne Thorn, Circuit Judge

cc: Samuel M. Hill, Esquire
Michael C. Quillen, Esquire
A. W. Bolt, Esquire

Steven K. Wollstein, Esquire
John Haley, Esquire
Bentley Owens, Esquire
Drayton James, Esquire

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

September 9, 1994

1920324

BMW of North America, Inc. v. Ira Gore, Jr. (Jefferson: CV-90-9658)

CERTIFICATE OF JUDGMENT

of Affirmance

IT IS ORDERED that the opinion issued in this cause on October 29, 1993, be withdrawn, and the opinion issued August 19, 1994, be substituted therefor. The applications for rehearing filed on November 12, 1993, and November 19, 1993, are hereby overruled.

WHEREAS, in keeping with the former order and judgment of this Court entered on August 19, 1994, the appellee, Ira Gore, Jr., did on August 26, 1994, file in this Court a remittitur in the amount of $2,000,000.00.

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be reduced to $2,004,000.00; and as thus reduced, the judgment of the circuit court is hereby affirmed, with interest and costs.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, BMW of North America, Inc., pay the costs of appeal and the costs taxed against the defendant in the court below will stand as taxed.

OPINION PER CURIAM

Hornsby, CJ., Maddox, Shores, Steagall, Kennedy and Ingram, JJ., concur; Houston, J., concurs specially.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 9 day of Sept, 1994.

/s/

Clerk, Supreme Court of Alabama